

THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATIONAL FAIR HOUSING  
ALLIANCE, INC., et al.,

Case No. 07-3255 SBA

**ORDER**

Plaintiffs,

[Docket Nos. 107 and 120]

v.

A.G. SPANOS CONSTRUCTION, INC.,  
et al.,

Defendants.

Currently before the Court is a Request by Defendants A.G. Spanos Construction, Inc., A.G. Spanos Development, Inc., A.G. Spanos Land Company, Inc., A.G. Spanos Management, Inc., and The Spanos Corporation (collectively the “Spanos Defendants”) for Leave to Notice a Motion for Reconsideration [Docket No. 120]. Also before the Court is the Spanos Defendant’s Petition for Certification pursuant to 28 U.S.C. § 1292(b) [Docket No. 107]. The request concerning reconsideration and the petition for certification to the Ninth Circuit both concern whether some of plaintiff’s claims should be barred by the two year statute of limitation under the Fair Housing Amendments Act (“FHA”).

On April 4, 2008, the Court issued an order denying the Spanos Defendant’s entire motion to dismiss [Docket No. 98] (the “Order”). In their motion to dismiss, the Spanos Defendant’s argued, inter alia, that some of plaintiffs “design and construct” claims pursuant to 42 U.S.C § 3604(f)(3)(C) were barred by the two year statute of limitations under the FHA [Docket No. 48]. In support of their motion, the Spanos Defendant’s cited *Garcia v. Brockway*, 503 F.3d 1092, 1101 (9th Cir. 2007). However, the Court could not consider *Garcia* because the Ninth Circuit had agreed to rehear the case *en banc*. The Court explained:

1 The Ninth Circuit recently addressed the question of when the  
2 FHA's two-year statute of limitations begins to run in *Garcia v.*  
3 *Brockway*, 503 F.3d 1092, 1101 (9th Cir. 2007). However, the  
4 Ninth Circuit has agreed to rehear the case *en banc*, and therefore  
5 *Garcia* cannot provide any guidance to this Court. See 512 F.3d  
6 1089 ('The three-judge panel opinion shall not be cited as  
7 precedent by or to any court of the Ninth Circuit').

8 (Order at 7.)

9 The Court proceeded to find that plaintiffs' "design and construct" claims  
10 were not barred by the FHA's two year statute of limitations finding that they  
11 were "continuing violations" under the FHA. (Order at 9.)

12 On May 13, 2008, the Ninth Circuit (*en banc*) issued its opinion in *Garcia v. Brockway*, 526  
13 F.3d 456 (9th Cir. 2008). The *Garcia* opinion explains:

14 [a] failure to design and construct . . . is not an indefinitely  
15 continuing practice, but a discrete instance of discrimination that  
16 terminates at the conclusion of the design-and-construction phase.  
17 . . .

18 Were we to now hold the contrary, the FHA's statute of limitations  
19 would provide little finality for developers, who would be required  
20 to repurchase and modify (or destroy) buildings containing  
21 inaccessible features in order to avoid design-and-construction  
22 liability for every aggrieved person who solicits tenancy from  
23 subsequent owners and managers. Indeed, now that we have  
24 recognized tester standing, an aggrieved person wouldn't even  
25 need to solicit tenancy, but merely observe the violation. See  
26 *Smith*, 358 F.3d at 1104. This is not what Congress provided in  
27 erecting a two-year statute of limitations for FHA  
28 design-and-construction claims. If Congress wanted to leave  
29 developers on the hook years after they cease having any  
30 association with a building, it could have phrased the statute to say  
31 so explicitly.

32 *Garcia*, 526 F.3d at 462-463.

33 In light of the Ninth Circuit's (*en banc*) holding in *Garcia*, the Spanos Defendant's contend  
34 that plaintiff's "design and construct" discrimination claims alleging violations of 42 U.S.C. §  
35 3604(f)(3)(c) are barred by the FHA's two year statute of limitations, except as to those apartment  
36 complexes built by the Spanos Defendants within two years of the filing of plaintiff's complaint.

37 Under Civil Local Rule 7-9 a party may make a motion for leave to file a motion for

1 reconsideration of an interlocutory order if: 1) at the time of the motion for leave, a material  
2 difference in fact or law exists from that which was presented to the Court before entry of the  
3 interlocutory order for which reconsideration is sought; and 2) in the exercise of reasonable  
4 diligence the party applying for reconsideration did not know such fact or law at the time of the  
5 interlocutory order. Civil L. R. 7-9. Unless otherwise ordered by the assigned Judge, no response  
6 need be filed and no hearing will be held concerning a motion for leave to file a motion to  
7 reconsider. *Id.*

8 The Ninth Circuit's recent holding in *Garcia v. Brockway* concerns a material issue in  
9 contention in this case, because it addresses the FHA's statute of limitations for "design and  
10 construction" claims brought under 42 U.S.C. § (f)(3)(C). The Court was precluded from  
11 considering *Garcia v. Brockway* and the Spanos Defendant's arguments thereunder when ruling on  
12 the their initial motion to dismiss.

13 Accordingly, it is ORDERED that the Spanos Defendants' Request for Leave to Notice a  
14 Motion for Reconsideration [Docket No. 120] is hereby GRANTED. Within 15 days of the date of  
15 entry of this order, the Spanos Defendants may notice a motion for reconsideration of this Court's  
16 order [Docket No. 98] denying the Spanos Defendants' motion to dismiss. Pursuant to Civil Local  
17 Rule 7-9(c), the motion for reconsideration shall be limited to the issue of whether the Ninth  
18 Circuit's opinion in *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) constitutes a change in law  
19 such that this court should reconsider its order denying the Spanos Defendants' motion to dismiss on  
20 statute of limitations grounds.

21 It is further ORDERED that the Spanos Defendant's Petition for Certification pursuant to 28  
22 U.S.C. § 1292(b) [Docket No. 107] is DENIED without prejudice to their refiling it subsequent to  
23 the Court's resolution of their motion for reconsideration.

24 The hearing set for July 15, 2008 is hereby VACATED.  
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26  
27  
28

IT IS SO ORDERED.

Dated: 7/11/08

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge